

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 24, 2006

STATE OF TENNESSEE v. TONYA MCMURRAY

Direct Appeal from the Criminal Court for Sullivan County
No. 49988 R. Jerry Beck, Judge

No. E2006-00340-CCA-R3-CD - Filed February 5, 2007

The defendant, Tonya McMurray, appeals from the trial court's denial of probation or alternative sentencing. She pled guilty to bringing drugs into a penal institution (Class C felony) and to delivering a Schedule IV controlled substance (Class D felony), as a Range I offender. She received a sentence of three years and a fine of \$250 on count one, and a concurrent sentence of three years and a \$2,000 fine on count two. Although this defendant is presumed to be a favorable candidate for alternative sentencing, her long history of criminal conduct and failure of past efforts at rehabilitation were more than adequate reasons to deny her any alternative sentence. After careful review, we affirm the judgments from the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Stephen M. Wallace, District Public Defender, and Joseph F. Harrison, Assistant Public Defender (on appeal); and Michael LaGuardia, Kingsport, Tennessee (at trial), for the appellant, Tonya McMurray.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; H. Greeley Wells, Jr., District Attorney General; and James F. Goodwin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

While the defendant was serving time on a misdemeanor sentence in the Sullivan County jail, she was found with \$35.00 in her possession within her cell and later admitted she had smuggled Xanax, a Schedule IV controlled substance, into the jail facility by hiding the pills in her vagina. She pled guilty to introduction of a controlled substance into a penal institution (Class C felony) and to

delivery of a controlled substance (Class D felony). The defendant received an effective sentence of three years and a fine of \$2250.00. This sentence was consecutive to the sentence she was serving at the time of her arrest for these offenses.

Analysis

The sole issue on appeal is whether the trial court erred by denying her an alternative sentence. This court's review of the sentence imposed by the trial court is de novo with a presumption of correctness. T.C.A. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review is de novo. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

The burden is upon the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d), Sentencing Commission Comments. In conducting our review, we are required, pursuant to Tennessee Code Annotated section 40-35-210(b), to consider the following factors in sentencing:

(1) [t]he evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

Under the Criminal Sentencing Reform Act of 1989, trial judges are encouraged to use alternatives to incarceration. An especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. T.C.A. § 40-35-102(6).

In determining if incarceration is appropriate, a trial court may consider the need to protect society by restraining a defendant having a long history of criminal conduct, the need to avoid depreciating the seriousness of the offense, whether confinement is particularly appropriate to effectively deter others likely to commit similar offenses, and whether less restrictive measures have often or recently been unsuccessfully applied to the defendant. T.C.A. § 40-35-103(1); see also State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

A court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114, as they are relevant to the Tennessee Code Annotated section 40-35-103 considerations. T.C.A. § 40-35-210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. T.C.A. § 40-35-103(5); Boston, 938 S.W.2d at 438.

There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. T.C.A. § 40-35-103(2); State v. Batey, 35 S.W.3d 585, 588-89 (Tenn. Crim. App. 2000). Indeed, individualized punishment is the essence of alternative sentencing. State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). In summary, sentencing must be determined on a case-by-case basis, tailoring each sentence to that particular defendant based upon the facts of that case and the circumstances of that defendant. State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986).

Here, the defendant correctly asserts that she is presumed a favorable candidate for an alternative sentence under Tennessee Code Annotated section 40-35-102(6). However, the presumption was overcome during the sentencing hearing by evidence to the contrary. On appeal, the defendant has not met her burden of proving that the sentence is improper. A review of the record demonstrates that the trial court properly followed the principles of sentencing and all the relevant facts and circumstances. The defendant had an extensive history of criminal conduct and demonstrated an unwillingness to comply with earlier efforts at rehabilitation. The charge in count one of the underlying case was the result of the defendant smuggling drugs into jail while she was serving a sentence on a separate charge. We conclude that the trial court had more than adequate reason for denying an alternative sentence for this defendant and affirm the judgments of the trial court.

Conclusion

Based on the foregoing and the record as a whole, we affirm the judgments of the trial court.

JOHN EVERETT WILLIAMS, JUDGE